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08/654,600	05/29/96	MIZELL	R 5383

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EXAMINER

ROWAN, K

ART UNIT

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UNITED STATES DEPARTMENT OF COMMERCE
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 25

Application Number: 08/654,600
Filing Date: May 29, 1996
Appellant(s): MIZELL, III

MAILED
AUG 3 1999
GROUP 3600

Dennis Clarke
For Appellant

EXAMINER'S ANSWER

This is in response to appellant's brief on appeal filed May 12, 1999.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

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A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 3, 4, 6, 8-10 and 13 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

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2,715,295

Brown

8-1955

1,787,421

Ruddell

12-1930

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claims 2-4, 6, 8-13 are rejected under 35 U.S.C. 103 as being obvious over Ruddell in view of Brown. This rejection is set forth in prior Office action, Paper No. 19.

(11) *Response to Argument*

The combination of Ruddell in view of Brown shows all the structure recited. When the claimed and prior art products are substantially identical, a prima facie case for obviousness has been established. See MPEP 2112.01. The prior art trap possesses the characteristics of the claimed trap. See *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977).

Apparatus claims must be distinguished from the prior art in terms of structure rather than function. See *In re Danly*, 263 F.2d 844, 847, 120 USPQ 528, 531 (CCPA 1959). See MPEP 2114. In regard to the contention that the prior art reference are non-analogous art, three factors determine are to be considered. PTO classification is one factor and both references are from the same class and subclass. Also, the similarities in structure and function are factors to consider. In this case both traps show similar structure which can be seen by comparing Fig. 2 of Ruddell to Fig. 1 of Brown. Both traps have baffle which is number 30 of Ruddell and number 10 of Brown (see Fig. 4). Both traps show an entrance.

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Brown shows conduit 24 as an entrance. Ruddell shows an entrance in cylindrical sleeve 4. Both traps show a collection chamber: Brown number 1 and Ruddell number 1. As to the function of the traps, both are used to trap flying insects. No evidence has been submitted to prove that the patents to Brown and Ruddell will not trap other species of insects since other species are attracted to bait, colors and light. For example, flies are attracted to both bait and colors in addition to light. Applicant's remarks drawn using improper hindsight reasoning have been noted. However, "any judgement on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time of the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper." See *In re McLaughlin* 443 F.2d 1392, 1395, 170 USPQ 209, 212 (CCPA 1971). As to the angle of the fins, routine experimentation would be used to determine the exact angle of the fins. Applicant has submitted no evidence that there is an unexpected result from the angle between the fins although less than 60 degrees should be avoided since insects tend to bounce off the fins. See page 6. However Brown and Ruddell both show angles greater than 60 degrees. As to the shape of the fins, Ruddell shows a truncated triangular fin. It should be pointed out that while applicant recites a triangular fin, a close inspection of Fig. 1(a) and Fig. 1(b) reveal that the fins are not true triangles because of the structure shown at the pointed top which shows two additional sides. However, it is not seen that truncated triangles, true triangles, pentagonal fins have any material impact on the

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capture of the target species since the function of all is the same, to guide the insect into the trap. As to the height of the device, changes in size are not a patentable feature. See *In re Rose*, 105 USPQ 137. It would have been obvious to experiment to determine the best size range for the trap. As to anchoring the base to the ground, one of ordinary skill in the art would have found it obvious to anchor the trap to the ground to keep the trap from falling over due to contact or from weather related events. Ruddell shows opening which act as means to anchor the trap to the ground. Clearly Ruddell is aware of the effect of color to attract insects. Brown however is silent on the concept of using color to attract insects to the trap and it

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appears that the color used by Brown for the fin member does not attract or repel the target species. For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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August 2, 1999

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